SUPREME COURT, U.S.
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No. 92-389

In the Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD CHENEY, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

DUSTY PRUITT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondent misstates the issue before this Court by characterizing it as "whether a lesbian or gay servicemember discharged solely because of her or his sexual orientation" has stated an equal protection claim. Br. in Opp. 13. The Army's regulation—which respondent never cites—is quite specific in making clear that it proscribes certain types of *conduct*, not sexual orientation. The regulation's statement of policy provides that "[t]he presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military

mission." Army Regulation (AR) 135-175, § VII, ¶ 2-37(a). The regulation goes on to specify that three types of evidence, unless rebutted, support the conclusion that a servicemember has engaged in homosexual conduct or is likely to do so: (1) direct proof that the servicemember "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act," (2) a statement by the servicemember that "he/she is a homosexual or bisexual," and (3) proof that the servicemember "has married or attempted to marry a person known to be of the same biological sex." AR 135-175, § VII, ¶2-39. In this case, the evidence considered by the Army Reserve Elimination Board showed both that respondent admitted that she is a lesbian and that she had twice gone through marriage ceremonies with other women. Pet. App. 4a-6a.[1] Respondent's various arguments supporting her contention that review is not warranted each dissolve once it is understood that

[1] Citing the Excerpt of Record at 224-225 (Br. in Opp. 4 n.1), respondent states that "[t]he findings of the Board show that the [marriage] ceremonies were *not* the basis for her discharge." The record shows no such thing. The pages respondent cites, which are from the "summarized proceedings of officer elimination action," show that the newspaper article reporting that respondent had twice married other women was entered into evidence over respondent's objection. The summarized findings go on to say "[t]hat the criteria of Paragraph 2-39 of AR 135-175 have been met." That paragraph of the regulation includes the provision stating that the Army normally will conclude that a servicemember has engaged in homosexual conduct or has a propensity to do so if "[t]he member has married or attempted to marry a person known to be of the same biological sex."

respondent was not discharged merely on account of her sexual orientation, but because application of the regulation to the facts in evidence showed that she has engaged in homosexual conduct and has a propensity to engage in homosexual conduct.

1. The primary reason petitioner offers for denying the petition is that President-elect Clinton "has stated that, upon taking office, he will immediately rescind the military's ban on service by lesbians and gay men." Br. in Opp. 7. This Court should not make its docketing decisions based on statements made by candidates running for public office. The current policy remains in full force; whether it will be changed, when, and how are purely matters of extra-record speculation that should not affect the need for this Court to grant review to resolve the existing conflict among the circuits on a matter of national importance.[2]

In any event, Mr. Clinton's position has been reported to be "that while sexual orientation is a gay man's or lesbian's own business, the issue should be whether they have 'done anything which would disqualify them' from service." *Clinton Says He'll 'Consult' On Allowing Gays in Military*, Wash. Post, Nov. 13, 1992, at A1, col. 3, A11. Acts of sodomy—which are prohibited by the criminal laws of many States, the Uniform Code of Military Justice

[2] Respondent incorrectly suggests (Br. in Opp. 7 n.3) that the government obtained a stay of proceedings in *Cammermeyer* v. *Cheney*, No. C-92-942Z (W.D. Wash.) on account of the pending election. In fact, the government sought a stay pending disposition of this case. Motion of Federal Defendants for a Stay of Proceedings at 4.

(10 U.S.C. 925), and by the laws of many nations where troops might be stationed (see Pet. 11, 15; *Beller* v. *Middendorf*, 632 F.2d 788, 811 (9th Cir. 1980), certs. denied, 452 U.S. 905 and 454 U.S. 855 (1981))—may be disqualifying.[3] Indeed, Mr. Clinton recently stated his intention to establish a committee to study the question. *Clinton Says He'll 'Consult' On Allowing Gays In Military*, Wash. Post, Nov. 13, 1992, at A1, col. 3; *Nunn, Dole Urge Caution On Military Gay Policy*, Wash. Post, Nov. 16, 1992, at A11, col. 1.

2. The second argument respondent offers in support of her contention that review is not warranted is that "review of this case in its present posture is, at best, premature." Br. in Opp. 9. To the contrary, further proceedings in the district court in this case most likely would be a waste of time. The justification for the military's policy is stated on the face of AR 135-175, and is grounded in part on social disapproval of homosexual conduct.[4] The court of appeals

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[3] Respondent states that we "confuse sodomy with homosexuality" (Br. in Opp. 14) because heterosexuals may commit acts of sodomy. Respondent overlooks the fact that "[s]odomy is an act basic to homosexuality * * * [and] is the primary form of homosexual activity." *Watkins* v. *United States Army*, 837 F.2d 1428, 1455 (9th Cir. 1988) (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 111 S. Ct. 384 (1990). Unlike a propensity to commit homosexual acts, a propensity to commit heterosexual acts does not necessarily translate into a propensity to commit sodomy.

[4] AR 135-175, § VII, ¶ 2-37(a) provides in relevant part:

> The presence of [homosexual] members adversely affects the ability of the armed forces to maintain discipline, good

refused to uphold the military's policy on the basis of the justification provided by the military, but instead remanded with instructions that the district court disregard any justification of the regulation based on social disapproval of homosexuality. Pet. App. 14a-15a.

The court of appeals' decision is wrong. This Court in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), sustained a *criminal* statute proscribing homosexual acts. And in *Beller* v. *Middendorf*, *supra*, the Ninth Circuit (per Kennedy, J.) correctly concluded, in upholding a discharge decision, that "[t]he Navy can act to protect the fabric of military life, to preserve the integrity of the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own." 632 F.2d at 811. But more to the point at this stage of the case, the fact is that the court of appeals has instructed the district court to review the military's policy, but to disregard many of the justifications for the policy that are set out in the Army's regulation. There is little point to such an exercise.

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order, and morale; to foster mutual trust and confidence among members; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Armed Forces; to maintain the public acceptability of military service; and to prevent breaches of security.

3. The third reason respondent provides for denying the petition is that the decision of the court of appeals in this case does not conflict with any decision of this Court or any other court of appeals. Respondent is wrong on both counts.

Respondent says that the regulation does not conflict with this Court's decision in *Bowers* v. *Hardwick* because "the regulation at issue in this case uses homosexuality, not sodomy, as its basis for classification." Br. in Opp. 15. As we have stated, however, that claim flies in the face of the regulation at issue, which provides for the discharge of "persons who engage in homosexual conduct" or "demonstrate a propensity to engage in homosexual conduct." AR 135-175, § VII, ¶ 2-37(a). And it is unrealistic, to say the least, for respondent to suggest that the Army cannot reasonably infer that she has engaged in or has a propensity to engage in homosexual acts, since she has stated that she is a lesbian and has twice married other women. See *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).

Similarly, with respect to the decisions of the courts of appeals, respondent claims that they are distinguishable because none of them arose from a situation where "a lesbian or gay servicemember [was] discharged solely because of her or his sexual orientation." Br. in Opp. 13. As we have explained, this case does not involve such a situation either. But proof of particular homosexual acts was not presented in *Ben-Shalom* v. *Marsh*, 881 F.2d at 464, or *Woodward* v. *United States*, 871 F.2d 1068, 1074 n.6 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990), yet the

courts of appeals upheld the discharges at issue in those cases. So if respondent contends that a homosexual servicemember may not be discharged in the absence of evidence of particular acts of sodomy, that claim cannot be reconciled with the holdings of the Seventh Circuit and the Federal Circuit.

4. Finally, respondent does not dispute that the government's petition presents an important legal issue. Nor does she dispute that the resolution of the question presented will affect a number of pending cases. In light of the conflict in the circuits, this Court should decide whether the military's policy of discharging servicemembers who engage in, or have a propensity to engage in, homosexual conduct violates the equal protection component of the Fifth Amendment.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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